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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 264

PAUL DE LUCIA,
Petitioner,

v.

UNITED STATES OF AMERICA.

Petition for Rehearing

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May it please the Court:

The affidavit filed in support of the complaint was insufficient, consequently the District Court lacked jurisdiction.

We quote from the opinion of the Court of Appeals (Our Petition, p. 76, 256 F. 2nd 487, 488:

"Relying on *United States* v. *Zucca*, 351 U.S. 91, De Lucia contends that an affidavit showing good cause is a prerequisite to the maintenance of a denaturalization proceeding, and, while the affidavit was submitted under pretense that it shows good cause, affiant's as-

sertions therein are not dependent upon his knowledge, and that; although he swears that he has access to the official records of the Service, he does not claim he is the custodian thereof or that the files were complete, but he merely states his 'opinion as to what may be shown by some files.'

The question of the sufficiency of this affidavit has been resolved by *Nowak* v. *United States*, 355 U.S. 802. In accordance with that decision, we hold the Gordon affidavit sufficient."

We respectfully submit that *Nowak* does not answer the contentions made in the case at bar and therefore the Court of Appeals erred. Mr. Justice Harlan said in *Nowak*:

"The affiant was an attorney of the Immigration and Naturalization Service who swore that the allegations made in his affidavit were based upon facts disclosed by official records of the Naturalization Service to which he had had access. In substance the affidavit set forth the same matters upon which the District Court's later decree of denaturalization was based, and showed with adequate particularity the grounds on which the Government's suit rested. Sworn to as it was by a responsible official of the Naturalization Service, we consider that the affidavit satisfied the purpose of § 338 (a) to protect those proceeded against from ill-considered action. See *United States* v. *Zucca*, *supra*, at 99-100."

In *United States* v. *Minnerich*, 250 F 2nd 721, 725., Judge Finnegan said:

"The proposition which the government, in these denaturalization cases, desires to prove is that citizenship was, at an earlier date, procured under circumstances described in § 340 authorizing annulment of the order admitting an alien to citizenship. The affidavit, then, should reveal facts offered to establish that proposition. See, *e.g.*, I Wigmore § 2 (3rd ed.

1940). This simply means disclosing some of the premises from which the conclusion is drawn, by the United States Attorney, that § 340 proceedings are warranted. From such an affidavit an experienced judge should be able to detect a United States attorney's reckless categorization or noncritical selection of candidates for denaturalization, and we think that is all Congress intended by the procedural safeguard."

In the case at bar, we submit, that if the District Judge had applied such test it would have been seen that the affidavit was defective, for reasons not involved in *Nowak*.

(a) The affidavit based the conclusion of good cause on statements known by the affiant to have been false. The very foundation of the complaint, as to matters jurisdictional, were abandoned at the trial, *i.e.*: (1) no certificate of arrival; (2) no attachment.

(b) The evidence disclosed that the files examined by affiant could not have contained the information gathered subsequent to the making of the affidavit.

(c) The affidavit, complaint and evidence show that the suit was first commenced and then a search was made for proof.

In our argument, intended to convince Your Honors that the record shows an abuse of the Federal Rules of Civil Procedure, we pointed to the defects in the affidavit. If Your Honors now deem the jurisdictional point a substantial ground available to petitioner, we respectfully refer Your Honors again to our petition, pp's. 22, 24 and Reply, pp. 17, 27. We also respectfully refer to our briefs filed in the Court of Appeals and certified here. Please see Appendix IV, Brief for Defendant in Contempt Case.

Intervening circumstances of substantial effect.

Your Honors denied certiorari in the case at bar on October 13, 1958. On October 20, 1958 there was published the opinions rendered in *United States* v. *Fisher*, 258 F. 2nd 362. From such opinions Your Honors will perceive that the Judges of the court below differ concerning the importance of a proper affidavit. Judge Schnackenberg, who wrote the opinion in the case at bar, dissented from Judge Finnegan and Judge Parkinson. In our petition in the case at bar, (pp. 32, 48) we requested Your Honors to take jurisdiction because of the difference of view between Judge Finnegan, as expressed in *United States* v. *Minnerich*, 250 F. 2nd 721 and that expressed by Judge Schnackenberg in the case at bar. (Our Reply pp. 28, 45, 59, 71). Judge Parkinson served on all three panels, *Minnerich*, *De Lucia* and *Fisher*. Your Honors will perceive, from the dissenting opinion rendered by Judge Schnackenberg in *Fisher*, that the Judges in the court below differ also concerning the meaning of *Mattes* v. *United States*, 356 U.S. 256.

Your Honors will also note from the opinions rendered in *United States* v. *Diamond*, 255 F. 2nd 749, that the Judges of the Ninth Circuit differed. The order of affirmance of the District Court dismissing the actions was affirmed by this Honorable Court, 78 S. Ct. 715.

We respectfully submit that these differences and the consequent confusion, call for the exercise of the supervisory power vested in this Honorable Court.

Illegal procurement of naturalization was not ground for denaturalization in proceeding which was not yet pending on effective date of 1952 Act.

In *United States* v. *Miller*, 152 F. Supp. 27, the District Court struck the paragraph from the complaint containing the charge of illegal procurement. We respectfully refer Your Honors to the opinion of Judge Carter for a review of the authorities. In our petition, in making another point, p. 32, we complained of the failure on the part of the courts below to clearly define the basis of the decree. Here in our petition for rehearing, we respectfully request Your Honors to find from the record that the courts below regarded the certificate as having been illegally procured. It must then follow that the law conferring jurisdiction has been repealed. After the effective date of the McCarran Act, as to actions not then pending, illegal procurement was not continued as a ground for denaturalization.

We respectfully pray for a rehearing and the granting of certiorari.

Respectfully submitted,

WM. SCOTT STEWART
Counsel for Petitioner

Certificate of Counsel.

WM. SCOTT STEWART, counsel for petitioner respectfully certifies that the above petition for rehearing is presented in good faith not for delay and is restricted to the grounds specified in Rule 58.

WM. SCOTT STEWART
Counsel for Petitioner